

Exhibit 8

1 ** H I G H L Y C O N F I D E N T I A L **

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Civil Action No. 1:15-cv-07488-CM

5 -----x

6
7 IN RE NAMENDA DIRECT PURCHASER

8 ANTITRUST LITIGATION

9 -----x

 October 26, 2017

 8:58 a.m.

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12
13 Videotaped Deposition of GEORGE W.
14 JOHNSTON, JR., taken by Defendants,
15 pursuant to Notice, held at the offices of
16 Gibbons, P.C., One Gateway Center, Newark,
17 New Jersey, before Todd DeSimone, a
18 Registered Professional Reporter and Notary
19 Public of the State of New Jersey.
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23
24
25

Page 50

Page 52

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 Q. We were discussing the

6 Memantine Studies earlier this morning.

7 You would agree with me,

8 wouldn't you, that the Memantine Studies do

9 not expressly disclose Alzheimer's disease?

10 A. I would agree that the studies

11 discuss OBS. The studies discuss treatment

12 of dementia. And because of the genus

13 species concept, they would disclose the

14 Alzheimer's of the dementia type.

15 Just for simplicity, maybe we

16 can just say Alzheimer's, if it's okay with

17 you.

18 Q. That's fine with me.

19 A. Great.

20 Q. I think we understand each

21 other on this, but I just want to be clear,

22 those Memantine Studies, they don't use the

23 words "Alzheimer's disease," do they?

24 A. Again, I haven't gone through

25 every one now, but to the best of my

[REDACTED]

[REDACTED]

[REDACTED] We have been

5 going a little bit over an hour, but feel

6 free to --

7 MR. JOHNSON: That's fine. I

8 will try to stop every hour or so today.

9 THE WITNESS: Do you want to

10 finish your anticipation section?

11 MR. JOHNSON: No, I've got a

12 little bit more, so why don't we take a

13 quick break.

14 THE WITNESS: Okay.

15 THE VIDEOGRAPHER: We will be

16 going off the record at 10 a.m. This marks

17 the end of media 1A.

18 (Recess taken.)

19 THE VIDEOGRAPHER: We are going

20 back on the record at 10:08 a.m. This

21 marks the beginning of media 1B.

22 Go ahead, Counselor.

23 MR. JOHNSON: Thank you.

24 BY MR. JOHNSON:

[illegible]

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1 disagree with it?
2 A. I don't -- I don't know if -- I
3 don't know if there are contrary reports or
4 expert witnesses who might disagree with
5 that, but I don't personally have any basis
6 for disagreeing with it. But, again, I'm
7 not the technical expert.

[REDACTED]

[REDACTED]

3 Q. And, again, you don't have any
4 basis to disagree with that, do you?
5 A. I don't have a basis to agree
6 or disagree. I'm not the technical expert.
7 There might have been technical experts who
8 would have a different interpretation. I
9 just don't recall.

[REDACTED]

Page 60

[REDACTED]

[REDACTED]

<div>Page 62</div> <div>[REDACTED]</div>	<div>Page 64</div> <div>[REDACTED]</div>
<div>Page 63</div> <div>[REDACTED]</div>	<div>[REDACTED]</div>

<p style="text-align: right;">Page 130</p> <p>1 Q. And the answer was, down on 2 page 42, line 7, "Okay. Well, I think 3 most -- I think most people -- well, 4 let's -- okay. So let me think. So I 5 think there would have been -- I think on 6 balance people would not have been 7 motivated to try that." 8 Do you see that? 9 A. Yes, I do.</p> <p>[REDACTED]</p> <p>22 He says, well, it's a short 23 term, maybe someone would have wanted to go 24 long term. The same words -- almost the 25 same words as Dr. Fleischhacker was</p>	<p style="text-align: right;">Page 132</p> <p>1 Q. Okay. And at the end of his 2 answer on page 44 says "but there also 3 might be reasons to be encouraged to try," 4 right? 5 A. He goes back and forth. 6 Q. Back and forth. 7 A. In a very logical fashion, very 8 methodical fashion, and the net result is, 9 I think it is fair to say, he is just not 10 sure. 11 Q. He is not sure. So how can he 12 be sure that the claims are not enabled? 13 If it might make perfect sense to a person 14 of ordinary skill to try memantine in 15 patients with Alzheimer's disease, it is 16 inconsistent with his position that a 17 person reading the '703 patent wouldn't use 18 memantine for Alzheimer's disease? 19 MR. CHORUSH: Objection. 20 A. That's not the standard. 21 Q. But that was his position, 22 wasn't it? 23 A. That's not the standard for 24 enablement. The standard for enablement is 25 that the skilled artisan, without question,</p>
<p style="text-align: right;">Page 131</p> <p>1 suggesting. He says "For example, but if 2 the Fleischhacker paper had already come 3 out" -- he is talking about the timing, I 4 guess in terms of whether or not it is out 5 or not -- he goes on to say "then they" -- 6 "they" being the skilled artisan -- "might 7 have been dissuaded by the fact that the 8 Fleischhacker paper did not report a 9 beneficial effort in Alzheimer's disease 10 benefits" -- "might," he doesn't say they 11 definitely would have been dissuaded -- 12 then he goes on to say "although you 13 specified long term," and then he says "the 14 Fleischhacker was short term." 15 You know, so he then goes on to 16 say that "A skilled artisan might have 17 said, well, you know, maybe this is just 18 too short a time to treat."</p> <p>[REDACTED]</p> <p>r.</p>	<p style="text-align: right;">Page 133</p> <p>1 would know how to use it, and he is saying 2 Fleischhacker goes both ways. 3 As a result of that, you would 4 question whether to use it, and you would 5 need additional data which was not found in 6 the specification to clarify or direct a 7 skilled artisan that it makes sense to use 8 it. 9 Q. Okay. 10 A. Fair enough? 11 Q. I understand your position. 12 A. Sounds good.</p> <p>[REDACTED]</p> <p>24 Q. And enablement is a conclusion 25 of law, right?</p>

<p style="text-align: right;">Page 134</p> <p>1 A. As I understand it, yes. But, 2 again, for clarity, we had two enablement 3 arguments. One was the unproven 4 hypothesis, and the other one was did they 5 enable the full scope. 6 Q. I got it. 7 A. And I assume you are talking 8 about the unproven hypothesis approach that 9 we have articulated in this report, in my 10 report. 11 Q. Well, all I've asked you so far 12 is just whether enablement is a conclusion 13 of law. 14 A. Okay. 15 Q. And your recollection is that 16 it is, right? 17 A. Right.</p> <p>[REDACTED]</p>	<p style="text-align: right;">Page 136</p> <p>[REDACTED]</p> <p>4 Q. They are advising their clients 5 on the likelihood that a court will reach a 6 particular legal conclusion? 7 A. No. They are asking for my 8 opinion based upon my professional 9 judgment, what's the likelihood of success. 10 Q. And success means which way the 11 Court comes out? 12 A. That's fair. That's fair. 13 Q. And on enablement, it's a 14 question of law, so it is the likelihood of 15 success with regard to a particular legal 16 conclusion, right? 17 A. Well, it's applying the law to 18 the facts and to the differences in the 19 facts between the two parties, and then the 20 additional secret sauce of my putting my 21 professional judgment into the mix to come 22 out with a percentage. 23 Q. I understand. 24 A. Which happens again and again 25 and again at major pharmaceutical</p>
<p>[REDACTED]</p>	<p style="text-align: right;">Page 137</p> <p>1 organizations.</p> <p>[REDACTED]</p>

35 (Pages 134 - 137)

Page 138

[REDACTED]

Page 140

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 138 - 141)

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3 Q. The last sentence is "In fact,
4 one of ordinary skill in the art, in view
5 of the severe hallucinogenic and
6 memory-impairing side effects, would have
7 been dissuaded by the '703 patent from
8 administering memantine to patients
9 diagnosed with Alzheimer's disease."

10 Did I read that correctly?

11 A. You did.

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2 Q. In terms of anything. Do you
3 recall them giving inconsistent testimony?

4 A. I can go through my report if
5 you would like, but I don't -- I don't
6 think you would prefer me to do that.

7 Q. You are correct, yes.

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1 Have you ever served as a judge
2 at a trial?

3 A. No.

4 Q. Have you ever represented a
5 party in court at a trial?

6 A. You mean in terms of presenting
7 arguments?

8 Q. Yes.

9 A. At a trial?

10 Q. Yes.

11 A. No.

12 Q. How many trials have you
13 observed in your career?

14 A. Ballpark, 15, 20, part-time and
15 full-time, depending upon the matter.

16 Q. Meaning that for some of those
17 you may not have been present for the
18 entire trial?

19 A. Correct.

20 Q. And were all of those patent
21 trials?

22 A. Yes.

23 Q. And perhaps I asked you this
24 before, but maybe I didn't, how many patent
25 trials have you observed in the District of

41 (Pages 158 - 161)

<p style="text-align: right;">Page 162</p> <p>1 Delaware?</p> <p>2 A. You did ask that before and I</p> <p>3 think my final answer was a few.</p> <p>4 Q. A few?</p> <p>5 A. A few.</p> <p>6 Q. I think before you said one or</p> <p>7 two or three, does that sound like a few?</p> <p>8 A. Well, I would say one to</p> <p>9 five --</p> <p>10 Q. One to five, okay.</p> <p>11 A. -- would be a few.</p> <p>12 Q. And just so my question was</p> <p>13 clear, I did say observed, so you mean you</p> <p>14 were present for those few trials?</p> <p>15 A. Correct.</p> <p>16 Q. Okay. Fair to say that most of</p> <p>17 Roche's patent cases were outside the</p> <p>18 District of Delaware?</p> <p>19 A. During what time period?</p> <p>20 Q. During your time period at</p> <p>21 Roche.</p> <p>22 A. I think that's fair to say.</p> <p>23 Q. Would it be fair to say that</p> <p>24 most of them were in the District of New</p> <p>25 Jersey?</p>	<p style="text-align: right;">Page 164</p> <p>1 Q. Fair to say that you settled</p> <p>2 most of the patent cases that you oversaw</p> <p>3 in your time at Roche?</p> <p>4 A. In terms of either settling or</p> <p>5 prevailing, yes.</p> <p>6 Q. What about settling versus any</p> <p>7 disposition on the merits, win or lose, do</p> <p>8 you think you settled more patent cases</p> <p>9 than you went to a final decision on?</p> <p>10 A. I would say about 50/50.</p> <p>11 Q. 50/50?</p> <p>12 A. Yeah.</p> <p>13 Q. Okay.</p> <p>14 A. Again, I'm guessing. I don't</p> <p>15 have any real statistics for that. It is</p> <p>16 just my recollection as I sit here today.</p> <p>17 Q. Okay. Would you dispute that</p> <p>18 Judge McKelvie knows patent trials in the</p> <p>19 District of Delaware better than you do?</p> <p>20 A. At what time?</p> <p>21 Q. 2010.</p> <p>22 A. Yeah, I don't know if I know</p> <p>23 more than Dr. McKelvie -- Dr. McKelvie --</p> <p>24 Judge McKelvie -- did we say Dr. before?</p> <p>25 Q. It is entirely possible. I'm</p>
<p style="text-align: right;">Page 163</p> <p>1 A. I think that's fair to say too.</p> <p>2 Q. Can we quantify that at all in</p> <p>3 terms of a percentage of cases that were</p> <p>4 not in the District of Delaware?</p> <p>5 MR. CHORUSH: Objection.</p> <p>6 A. It is tough for me to do that</p> <p>7 because we were all over the country, from</p> <p>8 Texas to Northern California, Indianapolis,</p> <p>9 to New Jersey, to Pennsylvania, to</p> <p>10 Delaware, even down into Florida. So it is</p> <p>11 hard for me to do that.</p> <p>12 Q. I looked and I only found one</p> <p>13 final decision in a Roche patent case from</p> <p>14 a court in the District of Delaware. Does</p> <p>15 that sound about right to you?</p> <p>16 A. It's possible. The reason I</p> <p>17 say it's possible, because it is very</p> <p>18 likely we had more than that but often we</p> <p>19 were able to settle matters.</p> <p>20 That was one of the approaches</p> <p>21 that we at Roche liked to do, if at all</p> <p>22 possible. We were always open to</p> <p>23 reasonable settlement terms. So I can't</p> <p>24 say that one is correct, if you take into</p> <p>25 consideration settlements.</p>	<p style="text-align: right;">Page 165</p> <p>1 used to calling people Dr. in their</p> <p>2 deposition.</p> <p>3 A. In any event, Judge McKelvie in</p> <p>4 2010. The reason I say that is he left the</p> <p>5 bench in 2000, so there is a lot of</p> <p>6 territory between 2000 and 2010.</p> <p>7 So to be candid with you, I</p> <p>8 don't know what his skill set and his</p> <p>9 experience and his relationships to the</p> <p>10 Delaware judiciary might be at 2010.</p> <p>11 Q. Okay. Do you think you are</p> <p>12 more qualified than Judge McKelvie to opine</p> <p>13 on the likely outcome of the '703 patent</p> <p>14 litigation were there a trial?</p> <p>15 A. Let me, if you don't mind, let</p> <p>16 me rephrase that a little bit based on what</p> <p>17 I was asked to do.</p> <p>18 Going back to what I was asked</p> <p>19 to do is to consider what a reasonable</p> <p>20 patent attorney would do to come up with</p> <p>21 some sort of a quantifiable number in terms</p> <p>22 of overall likelihood of success, which</p> <p>23 could be communicated to the client, either</p> <p>24 of the two litigants, at the time of</p> <p>25 settlement. And I do think -- I know that</p>

<p style="text-align: right;">Page 166</p> <p>1 I would be more qualified than Judge 2 McKelvie because that's what I did at 3 Roche. That was one of the aspects that 4 was my job for 16 years. 5 Q. You don't think Judge McKelvie 6 has extensive experience counseling clients 7 on the potential outcome of a pending 8 patent litigation? 9 A. Well, let's see what he says. 10 Q. I don't think we have marked 11 his report as an exhibit yet, so can you 12 answer that without looking at his report? 13 A. If you want me to, but I prefer 14 to have the best information in front of 15 me. 16 Q. Let's try for now to do it 17 without his report. 18 A. Okay. And if you would be 19 gracious enough to repeat the question. 20 Q. Sure. The question was you 21 don't think Judge McKelvie has extensive 22 experience counseling clients on the 23 potential outcome of a pending patent 24 litigation? 25 A. Well, I understand he worked at</p>	<p style="text-align: right;">Page 168</p> <p>1 A. And "these issues," we are 2 talking about likelihood of success, just 3 to make sure we're on the same page? 4 Q. Yes. 5 A. I do, in conjunction with my 6 experience of 36 years at Hoffmann-LaRoche 7 interfacing on a regular basis with the 8 scientists, yes. My understanding is, and, 9 again, without looking at the report, that 10 Judge McKelvie has no scientific background 11 whatsoever. 12 Q. And the judge who would have 13 decided the '703 patent case did not have a 14 technical background either, did he? 15 A. Judge Sleet? 16 Q. Yes. 17 A. I don't know. I just don't 18 know. 19 Q. Judges who decide patent cases 20 in the United States do not of necessity 21 have technical backgrounds, do they? 22 A. At the District Court level? 23 Q. Yes. 24 A. I think it's fair to say that 25 the vast majority do not have technical</p>
<p style="text-align: right;">Page 167</p> <p>1 Covington & Burling for a number of years. 2 I don't know specifically how many clients 3 he was involved with at that time as 4 related to patent litigations. I don't 5 know if his clients asked him to opine on 6 those type of things. Normally those 7 questions are handled by inside counsel. 8 They are the type of questions that a chief 9 patent counsel would be required to provide 10 information to senior management. 11 Q. Okay. 12 A. So I guess the answer is no, I 13 think I would be better qualified with 14 regard to that specific issue. 15 Q. Okay. Can you remind me, sir, 16 of your undergraduate degree? 17 A. Yeah. I received a bachelor of 18 engineering, concentration in chemical 19 engineering, from Stevens Institute of 20 Technology in Hoboken. 21 Q. Do you think your technical 22 background in terms of your undergraduate 23 degree makes you better suited than Judge 24 McKelvie to opine on the issues in this 25 case?</p>	<p style="text-align: right;">Page 169</p> <p>1 expertise. They might have some. I 2 haven't done a survey. I'm shooting from 3 the hip. But I think it's fair to say at 4 least the majority have other than 5 technical backgrounds. 6 Q. Would you be surprised to learn 7 that Judge Sleet didn't have any scientific 8 training? 9 A. No, I wouldn't be surprised. 10 Q. Do you think your undergraduate 11 degree in engineering would make you better 12 suited to understanding what the judge 13 would have decided at trial? 14 MR. CHORUSH: Objection. 15 A. Well, two things. One, it is a 16 chemical engineering degree, and we are 17 talking about -- 18 Q. I'm sorry, I didn't mean to 19 misstate it. 20 A. Oh, that's okay. I didn't take 21 offense. Chemical engineering, which is 22 not inconsistent with what the broad 23 technology, broad technology, of this 24 patent, it is chemistry. 25 Moreover, with my experience,</p>

<p style="text-align: right;">Page 170</p> <p>1 as I mentioned before, interfacing on a 2 very regular basis with the Ph.D. and 3 post-docs at Hoffmann-LaRoche I think I 4 would have developed -- I have developed a 5 reasonable understanding. 6 Let me make clear, I do not 7 consider myself as a technical expert, 8 particularly in this matter. I said that 9 in my report and I just want to rephrase 10 it. But I think I would have more 11 understanding of the technology than Judge 12 McKelvie. 13 By the way, if I might, just 14 for the record, state I say "Judge 15 McKelvie" out of respect for his former 16 position as a judge. He is no longer a 17 judge. We could say "Mr. McKelvie," but, 18 again, out of my respect for his former 19 position, that's why I say Judge. 20 Q. I do the same. 21 A. Fair enough. 22 Q. Okay. So you said you think 23 you would have more of an understanding of 24 the technology than Judge McKelvie. You 25 would say the same for Judge Sleet if we</p>	<p style="text-align: right;">Page 172</p> <p>1 said -- 2 Q. Then let me just ask the 3 questions then and hopefully I will make it 4 clear. 5 Do you consider yourself a 6 technical expert in the field of the '703 7 patent? 8 A. No. 9 Q. And you're not a person of 10 ordinary skill in the art to which the '703 11 patent pertains? 12 A. That is correct, and it's noted 13 in my report. 14 Q. And you've read the expert 15 reports submitted in connection with the 16 '703 patent litigation, correct? 17 A. I have. 18 Q. And you did not have the 19 scientific expertise that those experts 20 possessed, correct? 21 A. I think that's fair to say. 22 Q. Nor do I. 23 So you agree, Mr. Johnston, 24 that you do not have the specialized 25 technical expertise required to opine on</p>
<p style="text-align: right;">Page 171</p> <p>1 assume he doesn't have a technical 2 background, correct? 3 A. Well, the reason I hesitate, is 4 because my job is different than Judge 5 Sleet's job. He has to make a decision, an 6 actual decision. All I have to do is -- 7 all, it is not so all -- what my goal was, 8 what I was asked to do, again, is what 9 would a reasonable patent attorney perceive 10 as the ultimate likelihood. I don't have 11 to say exactly what that is. I have to 12 give percentages. The judge has to 13 actually make the ultimate decision. So 14 it's a different role. 15 So I think that the skill set 16 that Judge Sleet has would be different 17 than the skill set that I have, and I think 18 with the question that was asked of me I 19 would respectfully suggest I have better 20 qualifications. 21 Q. Okay. Now, you mentioned a few 22 moments ago that -- well, you touched on, I 23 think, your lack of technical expertise; is 24 that fair? 25 A. I don't think I said that. I</p>	<p style="text-align: right;">Page 173</p> <p>1 whether the use of Mylan's product 2 infringes the claims of the '703 patent? 3 A. Just for clarity, I'm not a 4 technical expert and I wouldn't have the 5 expertise as a technical expert to make 6 that determination. 7 Q. I'm going to ask you a couple 8 of similar questions though. 9 A. Sure. 10 Q. Would you agree with me that 11 you did not have the specialized technical 12 expertise required to opine on what a 13 person of ordinary skill in the art 14 understood about memantine in 1989? 15 A. Let me just clarify. Again, it 16 goes back to why I was there, not to be a 17 technical expert, but review the evidence 18 established by the technical experts and 19 make a determination of what a reasonable 20 patent attorney would do. 21 Now, probably you are going to 22 ask me similar questions, so instead of me 23 repeating that each time, if you do ask me 24 similar questions, please consider that 25 that's the thrust, that I had a different</p>

<p style="text-align: right;">Page 174</p> <p>1 role than that of the technical experts. I 2 had a very focused role in terms of what a 3 reasonable patent attorney, often 4 considered, say, a chief patent counsel, 5 because we did it all the time, would have 6 perceived as the likelihood of success at 7 the time of settlement.</p> <p>13 Q. And you would agree with me 14 that if the '703 patent litigation had gone 15 to trial it would have been technical 16 experts that testified on the issues of 17 infringement, correct?</p> <p>18 A. Yes, technical experts would be 19 the ones who presented the evidence to 20 Judge Sleet to make a determination on.</p> <p>21 Q. The same with validity, 22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. And your expertise, sir, is 25 patent law; is that correct?</p>	<p style="text-align: right;">Page 176</p> <p>1 modeling in this case, did you?</p> <p>2 A. Absolutely not. That was not 3 what I was asked to do.</p> <p>4 Q. I understand. Do you plan to 5 testify at trial in this case?</p> <p>6 A. I will testify at trial if 7 asked to do so.</p> <p>8 Q. And if you are asked to do so, 9 do you plan to testify about patent law?</p> <p>10 A. Well, what I plan to testify 11 would be, number one, what I'm asked to do 12 in terms of at that time, and, number two, 13 is I believe it would have to be consistent 14 with what's in my briefs, I should say my 15 report, the opening report and the reply 16 report.</p> <p>17 So that means I would be 18 testifying on three or four items, the 19 likelihood of success, the timing, the 20 cost, and I'm sure I'm forgetting one, but 21 I think you got the drift. It is all 22 identified in the report.</p> <p>23 Q. You discuss the patent laws 24 throughout your report, it's fair to say, 25 isn't it?</p>
<p style="text-align: right;">Page 175</p> <p>1 MR. CHORUSH: Objection.</p> <p>2 A. Patent law -- I've got to slow 3 down -- patent law, licensing, my expertise 4 based upon being a chief patent counsel for 5 16 years at a major pharmaceutical 6 organization whereby on a regular basis we 7 would do these interpretations of 8 likelihood of success, I should say 9 perceived likelihood of success. We would 10 do the handicapping.</p> <p>11 Q. Sure. You're not an economist, 12 correct?</p> <p>13 A. No.</p> <p>14 Q. You don't have any degrees in 15 economics that I'm not aware of?</p> <p>16 A. No, sir.</p> <p>17 Q. You don't have any expertise in 18 economic modeling?</p> <p>19 A. No, I do not.</p> <p>20 Q. You don't consider yourself 21 qualified to testify as an expert regarding 22 economics, do you?</p> <p>23 A. You are correct.</p> <p>24 Q. And just to, because I have it 25 written here, you didn't do any economic</p>	<p style="text-align: right;">Page 177</p> <p>1 A. I do.</p> <p>2 Q. And you included as Exhibit M 3 to your report a 20-page summary of the 4 patent laws; is that correct?</p> <p>5 A. I did.</p> <p>6 Q. Feel free to take a look if you 7 need to.</p> <p>8 A. I did.</p> <p>9 Q. And I presume you included that 10 summary as Exhibit M so you could testify, 11 if needed, about those aspects of patent 12 law at trial?</p> <p>13 MR. CHORUSH: Objection.</p> <p>14 A. Well, the reason that I 15 included it was that I thought it would be 16 helpful to have it as a reference during my 17 deposition.</p> <p>18 Q. Okay. And here we are.</p> <p>19 A. And here we are, and we've used 20 it.</p> <p>21 Q. We have. So thank you for 22 that. Can you take your report out, 23 Exhibit 1.</p> <p>24 A. Sure.</p> <p>25 Q. I would like to go through a</p>

45 (Pages 174 - 177)

<p style="text-align: right;">Page 178</p> <p>1 few sections of your report, so let's just 2 dive in and my hope is that we can keep 3 this relatively quick. 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 Q. And that would include the 20 Schering case, correct? 21 A. Let's see. Yes, and it looks 22 like I cite it for the proposition that a 23 claim is invalid for anticipation if a 24 single prior art reference discloses each 25 and every limitation of the claimed</p>	<p style="text-align: right;">Page 180</p> <p>1 A. Correct. 2 Q. And then at the end of 3 paragraph 126 you have a footnote? 4 A. Yes. 5 Q. Footnote 57. 6 A. I do. 7 Q. And there you cite six 8 additional cases? 9 A. Correct. And I'm just -- well, 10 yes. Let me just answer your question. 11 Q. Thank you. Let's turn to page 12 39. Let me point you to paragraph 153. 13 A. Okay. 14 Q. You are citing several cases in 15 that paragraph for this genus species 16 argument that we talked about at length 17 today I think; is that right? 18 A. Let me take a look, please. 19 Q. Okay. 20 (Witness perusing document.) 21 A. Yes, sir. And what is the 22 question, please? 23 Q. The question was simply that 24 the cases in that paragraph, you are citing 25 them for this genus species argument that</p>
<p style="text-align: right;">Page 179</p> <p>1 invention. 2 Q. And then you cite on the next 3 page the Verve case as well? 4 A. I do. 5 Q. And then you also cite the 6 Sanofi v. Apotex case there still in 7 paragraph 125, right? 8 A. I do. 9 Q. And then you also have -- you 10 have a footnote -- strike that. 11 A. Okay. 12 Q. Paragraph 126, citing a few 13 additional cases, correct? 14 A. Well, let's see what it says. 15 That is correct. It looks like 16 I am citing certain cases for the 17 proposition that the standard for 18 anticipation and the standard for 19 enablement are a bit different. 20 Q. Well, what you said in your 21 first sentence is a patent claim, however, 22 cannot be anticipated by a prior art 23 reference if the allegedly anticipatory 24 disclosures cited as prior art are not 25 enabled?</p>	<p style="text-align: right;">Page 181</p> <p>1 we have been talking about today? 2 A. Broadly speaking, based upon 3 all of the testimony I have given today 4 regarding genus species, yes. 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED]</p>

<p style="text-align: right;">Page 210</p> <p>1 A. Yes, I do.</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 you are citing a Boston Scientific</p> <p>9 case; is that right?</p> <p>10 A. I see Boston Scientific, yes.</p> <p>11 Q. And you are citing it for the</p> <p>12 proposition that a hypothesis can be</p> <p>13 insufficient to prove infringement?</p> <p>14 A. Yes.</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 212</p> <p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>
<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p style="text-align: right;">Page 213</p> <p>1 We have been going through your</p> <p>2 report for a little while now. Fair to say</p> <p>3 that you explain the law throughout your</p> <p>4 report?</p> <p>5 A. Well, there I go with my yes</p> <p>6 and no again. You are right, but I</p> <p>7 respectfully suggest you can't look at that</p> <p>8 in a vacuum. It is part of the analysis</p> <p>9 that I had to do. It is part of the</p> <p>10 analysis that I would need to do to come up</p> <p>11 with a percentage.</p> <p>12 You take a look at the law, the</p> <p>13 various differences in the approaches that</p> <p>14 are being considered by both parties, you</p> <p>15 take a look at the facts, what's the</p> <p>16 difference. You apply the law and the</p> <p>17 facts and then you put that, as I say, my</p> <p>18 expertise over the years or my professional</p> <p>19 judgment as to how to handicap it, and</p> <p>20 that's exactly what I did.</p> <p>21 In no way was I intending to be</p> <p>22 the judge. The judge is the one that</p> <p>23 actually comes up with what the law is. I</p> <p>24 was not opining on the law. I was not</p> <p>25 being the judge. The judge makes that</p>

<p style="text-align: right;">Page 214</p> <p>1 determination. I had to do an analysis for 2 purposes of answering the question of which 3 I was asked, that of a reasonable patent 4 attorney, because a reasonable patent 5 attorney would have done that. 6 Q. And part of that analysis was 7 ascertaining what the law was and applying 8 that law to the facts? 9 A. Part of that analysis, yes, 10 part of that methodology. 11 Q. And you did that for each of 12 the parties' claims and defenses that you 13 addressed? 14 A. That is correct. 15 Q. Fair to say that your opinions 16 rely upon the law as you set it forth in 17 your report? 18 A. Well, I don't know if I used 19 the word "rely." That is probably fine. 20 But I would say my opinions require as a 21 component to establish that opinion a 22 review of the law as I see it, as I call 23 it. 24 Q. What if we took all of that law 25 out of your report, all these paragraphs</p>	<p style="text-align: right;">Page 216</p> <p>1 that portions of your report do in fact 2 read like a legal brief? 3 A. Well, again, I'm not sure what 4 you mean by reading like a legal brief. 5 You might have a different interpretation 6 than I do. 7 Q. I mean, a brief submitted to a 8 court arguing a particular legal issue. 9 A. If you are suggesting that 10 those type of documents have a legal 11 section or refer to the law, I would agree 12 to you. 13 But that was not my goal to put 14 together a legal brief, because if I put 15 together a legal brief, it wouldn't read 16 like this, it would read very differently. 17 Q. But you did set forth the law 18 and apply the law to the facts, correct? 19 A. That, among other things, yes, 20 as part of my methodology. 21 Q. I understand. And you are 22 familiar with the law of obviousness I 23 assume? 24 A. Yes. 25 Q. I'm sure that you are.</p>
<p style="text-align: right;">Page 215</p> <p>1 that we just went through where you are 2 citing case law, we removed all that from 3 your report, what would be left? 4 A. The facts. 5 Q. Would your analysis still make 6 sense if we removed all the law? 7 A. Well, I think so, and I think 8 so because the facts -- I then apply the 9 law to the facts in the various paragraphs 10 outside of the paragraphs which you just 11 identified. So I think it would make 12 sense, but I think it would be very hard to 13 understand. 14 Q. Fair to say that the portions 15 of your report that we just went through 16 oftentimes read like a legal brief? 17 MR. CHORUSH: Objection. 18 A. Well, let me phrase it this 19 way: Legal briefs have law. One of the 20 components which I needed to consider was 21 the law, and I did so in these paragraphs. 22 This was not a legal brief. This was not 23 intended to be a legal brief. It is a 24 report based upon what I was asked to do. 25 Q. So you wouldn't agree with me</p>	<p style="text-align: right;">Page 217</p> <p>1 A. Yes. 2 Q. Now, obviousness is a legal 3 conclusion, correct, based on underlying 4 findings of fact? 5 A. That's my understanding. 6 Q. You give opinions here on the 7 likelihood that Mylan would have prevailed 8 on obviousness, correct, from the 9 perspective of a reasonable and competent 10 patent attorney? 11 A. From the perspective of a 12 reasonable and competent patent attorney, 13 that person's perception so they could 14 advise their client at the time of 15 settlement, yes. 16 Q. Understood. And we've been 17 over this already, but enablement is also a 18 legal conclusion as well, right? 19 A. I would agree with you. 20 Q. And, likewise, you opine in 21 your report as to the likelihood that Mylan 22 would have prevailed on enablement from the 23 perspective of a reasonable and competent 24 patent attorney? 25 A. At the time of settlement and</p>

<p style="text-align: right;">Page 218</p> <p>1 all that good stuff, yes. But, again, just 2 for clarity, I think it is worth repeating, 3 in no way was I attempting to usurp the 4 power and the responsibilities of either 5 Judge Sleet or any other judge. They have 6 the responsibility of making the actual 7 determination on the law. 8 I'm simply handicapping it at 9 this particular time, providing my best 10 understanding of the law, providing the 11 facts as I see it based upon the evidence, 12 putting into that what I have learned over 13 the years in terms of professional judgment 14 and then making an assessment for 15 management at the time of settlement so 16 they can figure out is it worth settling 17 and for how much. 18 Q. I understand. I'm going to ask 19 a few questions here at the risk of making 20 Mr. Chorush blush a little bit. 21 Your counsel, Mr. Chorush, he 22 is an experienced patent lawyer, isn't he? 23 A. I think that's fair to say. 24 Q. He has been practicing patent 25 law for quite some time?</p>	<p style="text-align: right;">Page 220</p> <p>1 going to interrupt you for a moment just 2 because I don't know what you were about to 3 say, but whatever it was it was a 4 discussion that we had. 5 THE WITNESS: I'm sorry. You 6 are right. 7 MR. CHORUSH: And so please 8 don't get into conversations that we might 9 have had. 10 THE WITNESS: Thank you for 11 doing that. 12 Q. And you are going down a road 13 that I wasn't trying to send us down. 14 A. Fair enough, thank you. 15 Q. So I guess my question was, 16 based on Mr. Chorush's expertise as a 17 patent lawyer, you've got that in mind, you 18 would agree it wouldn't be appropriate for 19 him to take the witness stand in this case 20 and testify about Mylan's likelihood of 21 success on its various claims and defenses 22 in the '703 patent litigation? 23 MR. CHORUSH: Objection. 24 A. I agree, because I have more 25 expertise to answer the questions that have</p>
<p style="text-align: right;">Page 219</p> <p>1 A. I think that's fair to say. 2 MR. CHORUSH: You are aging me. 3 I'm objecting. 4 MR. JOHNSON: How long, 15 5 years maybe, something like that? 6 MR. CHORUSH: I think a little 7 bit more than that. 8 MR. JOHNSON: Okay. 9 Q. And Mr. Chorush, he has 10 significant experience evaluating the 11 merits of patent issues, doesn't he? 12 MR. CHORUSH: Objection. 13 A. I don't know. I just don't 14 know. 15 Q. Okay. 16 A. I just don't know. I know that 17 in this case he has been an exceptionally 18 gifted patent attorney, but I just want to 19 make it clear that all the percentages were 20 done by me and me alone. I did not rely on 21 anybody, including Mr. Chorush, to come up 22 with these percentages. 23 In fact, Mr. Chorush made it 24 crystal clear when -- 25 MR. CHORUSH: I'm sorry, I'm</p>	<p style="text-align: right;">Page 221</p> <p>1 been presented to me than Mr. Chorush. 2 Mr. Chorush might be the best 3 trial counsel in the United States, or 4 maybe the second best after you, but the 5 truth of the matter is there are few people 6 who have the expertise that I have other 7 than people who have held the role as chief 8 patent counsel, and I held that role for 9 many, many years. 10 Q. And that expertise is advising 11 your clients on issues relating to patent 12 law? 13 A. Well, in this case it is very 14 precise, handicapping this case so that 15 they could figure out how much it makes 16 sense to settle, what would be the 17 likelihood of success on each and every one 18 of these issues, and then together what 19 would be the overall success so that they 20 can determine whether or not it makes sense 21 to settle, consider settling, not settling, 22 put together budgets, or simply walking 23 away. 24 Q. Fair to say that any 25 experienced patent lawyer could take a</p>

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<p style="text-align: right;">Page 222</p> <p>1 crack at that?</p> <p>2 A. Well, a lot of people can take</p> <p>3 cracks at it. It is a question of whether</p> <p>4 or not it would be a considered a</p> <p>5 reasonable patent attorney with the</p> <p>6 expertise to do it.</p> <p>7 Chief patent counsel,</p> <p>8 particularly pharmaceutical chief patent</p> <p>9 counsel, with a number of years of</p> <p>10 experience, yes, I would suggest, because</p> <p>11 we all do it. It is part of what our job</p> <p>12 is. It is what we do. It is what we are</p> <p>13 supposed to do as a chief patent counsel at</p> <p>14 a pharmaceutical house.</p> <p>15 Q. Understood. Do you plan to</p> <p>16 testify at trial about patent prosecution</p> <p>17 procedures?</p> <p>18 A. That's up to the litigators to</p> <p>19 decide if they want me to discuss it.</p> <p>20 Q. Do you see any reason why that</p> <p>21 would be relevant in this case?</p> <p>22 MR. CHORUSH: Objection.</p> <p>23 A. It is really not my call. I</p> <p>24 would be prepared to discuss it because</p> <p>25 it's in my brief and my attachments, the</p>	<p style="text-align: right;">Page 224</p> <p>1 of me now.</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 Q. And in making that point you</p> <p>10 are assuming that both the in-house counsel</p> <p>11 and the trial counsel are reasonable patent</p> <p>12 attorneys?</p> <p>13 A. Not as I've defined reasonable</p> <p>14 patent attorneys.</p> <p>15 Q. Why is that?</p> <p>16 A. Well, because what I'm trying</p> <p>17 to suggest is that a person with expertise</p> <p>18 as chief patent counsel would be more</p> <p>19 appropriate to answer the questions of</p> <p>20 which I've been asked to answer, because</p> <p>21 for the various reasons I mention in</p> <p>22 paragraph 3, that trial counsel might be</p> <p>23 great trial counsel, but they might from</p> <p>24 time to time have a different approach to</p> <p>25 the likelihood of success for the various</p>
<p style="text-align: right;">Page 223</p> <p>1 exhibits, but I'm just not sure that's</p> <p>2 what's going to be required of me.</p> <p>3 All I know is they have those</p> <p>4 three or four items which I have asked to</p> <p>5 opine on specifically, and I'm assuming</p> <p>6 that's what I would be doing.</p> <p>7 Q. Have you ever worked in the</p> <p>8 Patent Office?</p> <p>9 A. No.</p> <p>10 Q. Are you qualified to testify as</p> <p>11 an expert regarding Patent Office practice</p> <p>12 and procedure?</p> <p>13 MR. CHORUSH: Objection.</p> <p>14 A. I have testified in depositions</p> <p>15 as an expert on patent practice and</p> <p>16 procedures, yes.</p> <p>17 Q. You believe you are qualified</p> <p>18 to do so?</p> <p>19 A. I do, from being a registered</p> <p>20 patent attorney who has prosecuted many</p> <p>21 patent applications over the years,</p> <p>22 particularly in the pharmaceutical arena.</p> <p>23 Q. Now, let me ask you to take out</p> <p>24 your reply report.</p> <p>25 A. Okey-dokey. I have it in front</p>	<p style="text-align: right;">Page 225</p> <p>1 reasons which I've identified.</p> <p>2 This is not to be disrespectful</p> <p>3 to trial counsel. Trial counsel's opinion</p> <p>4 would be at least one factor which I would</p> <p>5 consider, but the buck would stop with me</p> <p>6 in communicating to senior management.</p> <p>7 Q. But you would agree with me,</p> <p>8 wouldn't you, that different patent</p> <p>9 attorneys might have different views</p> <p>10 regarding the merits of a particular patent</p> <p>11 litigation?</p> <p>12 MR. CHORUSH: Objection.</p> <p>13 A. I would suggest that based upon</p> <p>14 the question I've been asked to answer and</p> <p>15 the fact that I need to put in my mind that</p> <p>16 of a reasonable patent attorney, there</p> <p>17 might be differences, but in all likelihood</p> <p>18 they would be pretty darn close to what I</p> <p>19 came up with, because my methodology has</p> <p>20 been something which I've used for many</p> <p>21 years as chief patent counsel.</p> <p>22 I know my colleagues who are</p> <p>23 chief patent counsels use the same</p> <p>24 methodology because they get the same</p> <p>25 questions from their senior management, are</p>

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1 we going to win, what's the percentages,
 2 why are we going to win, what is the
 3 downside, things of that nature, all of
 4 which gets wrapped up into the likelihood
 5 of success.
 6 I have been involved with other
 7 chief patent counsel through my
 8 professional experiences on the ACPC, the
 9 Association of Corporate Patent Counsel --
 10 Chief Patent Counsels, excuse me,
 11 Association of Chief Patent Counsels, which
 12 I have been a member of for many, many
 13 years, and we have programs twice a year
 14 where we actually sit and we talk about
 15 issues that we all face, how we run our
 16 departments, how we provide -- how we
 17 resolve issues, whether it be employment
 18 issues, issues with management, how we
 19 address things of that nature, and also
 20 this is a process for networking, and this
 21 gives me the opportunity, if I have a
 22 concern as to how to approach something, I
 23 would have the -- I would know who to call.
 24 And that happens on a regular
 25 basis. We know each other, and our

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1 approaches I found over the many years with
 2 regard to these handicapping matters are
 3 very, very similar.
 4 Q. So you think any reasonable and
 5 competent in-house patent counsel would
 6 have arrived at numbers very similar to
 7 yours; is that your opinion?
 8 A. I do.
 9 Q. Does it make a difference
 10 whether that reasonable and competent
 11 in-house patent counsel works for a branded
 12 company or a generic company?
 13 A. It shouldn't.
 14 Q. But does it?
 15 A. It could, but it shouldn't.
 16 And when I did mine, I made sure that that
 17 bias was eliminated.

[REDACTED]

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[REDACTED]

6 You said you tried to eliminate
 7 the potential bias inherent in this issue
 8 by taking a very conservative estimate.
 9 A. Yes.

[REDACTED]

[REDACTED]

4 Q. And if you had been less
 5 conservative, it's possible you would have
 6 come up with a higher percentage?
 7 MR. CHORUSH: Objection.
 8 A. It's possible, but, again, I
 9 approached the report from being
 10 conservative, so that right now I cannot
 11 tell you if it would be, in your words,
 12 significantly higher or not, a little
 13 higher, or around the same, but I think
 14 it's fair to say that if I wasn't
 15 conservative, it would be higher, and
 16 that's why I said greater than 60 percent.
 17 Q. Can you tell me how much
 18 higher?
 19 A. It is hard to say.
 20 Q. 5 percent?
 21 MR. CHORUSH: Objection.
 22 A. Well, again, you are asking me
 23 to shoot from the hip, and I would prefer
 24 not to do that.
 25 My percentages took a long time

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1 to figure out in my mind, and to make sure
2 that everything seemed appropriate, such
3 as, you know, taking into consideration the
4 statistical numbers, which I also took into
5 consideration as a factor, so that I think
6 at this stage for me to try to peg a number
7 on how much higher would be problematic.

8 I would tell you this, I have
9 never heard of a chief patent counsel in
10 either direction giving more than a 70 or
11 75 percent. It is just not done because
12 there are so many uncertainties. And what
13 I tried to do is be fair and reasonable as
14 a reasonable and a competent patent
15 attorney, hopefully, would do in making
16 this analysis.

Gender	Age Group	Percentage
Men	18-24	65%
Men	25-34	70%
Men	35-44	75%
Men	45 and over	85%
Women	18-24	55%
Women	25-34	60%
Women	35-44	65%
Women	45 and over	75%

24 Q. And so you took a conservative
25 approach?

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1 A. You got it.
2 Q. Okay. You said you never heard
3 of a chief patent counsel in either
4 direction giving more than a 70 or 75
5 percent chance of success?

6 A. Correct.

7 Q. So that puts some boundaries on
8 the analysis, doesn't it?

9 A. In a sense, pragmatic
10 boundaries, pragmatic boundaries.

11 Q. I see. So on one end you could
12 advise your client they have a 75 percent
13 chance of winning, right?

14 A. Correct.

15 Q. And on the other end they could
16 have a 75 percent chance of losing?

17 A. I think that's appropriate.

18 Q. So placing Mylan's case on that
19 spectrum, they are almost all the way at
20 one end, right?

21 MR. CHORUSH: Objection.

22 Q. You say a greater than 60
23 percent chance that Mylan would prevail.
24 That puts them right up at the boundary at
25 the highest possible chance of success.

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1 agreed?

2 MR. CHORUSH: Objection.

3 A. No, I would disagree.

4 Q. Why not?

5 A. Because there is a difference
6 between 50 and 55 and there is a difference
7 between 60, there is a difference between
8 60 and 65, all the way up to 75. It is a
9 gradient and from 75 being as strong as
10 exceptionally strong to 50 being a toss-up,
11 and everything in between.

12 Q. So there is a difference
13 between 60 and 65?

14 A. Yes.

15 Q. Pretty significant difference,
16 no?

17 A. Well, again, I don't know if I
18 would use the word "significant," but I
19 would say there's a difference.

20 Q. A meaningful difference?

21 A. "Meaningful" is a better word,
22 thank you.

23 Q. I brought up this specter of
24 in-house counsel for the generics having a
25 different perspective from in-house counsel

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1 for branded companies, right?

2 A. Correct.

3 Q. And you were in-house counsel
4 for a branded company?

5 A. Correct.

6 Q. You negotiated, I presume, many
7 settlements with generic companies over the
8 course of your time at Roche; is that
9 right?

10 A. That's very fair to say.

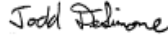
11 Q. And in your experience, is it
12 also fair to say that in-house counsel for
13 those generics often had a different
14 perception of the merits of their case than
15 you did?

16 MR. CHORUSH: Objection.

17 A. Well, I think it's fair to say
18 that at the beginning of negotiations, if
19 we put on the table our percentages, which
20 happened from time to time, there would be
21 a difference of opinion, as you would
22 expect at the beginning of a settlement
23 discussion.

24 But as things got closer
25 because the numbers got closer, then I

<p style="text-align: right;">Page 234</p> <p>1 think you would find that we all reached a 2 happy middle someplace. 3 Q. And in this case, that happy 4 middle was three months before the 5 expiration of the '703 patent, right? 6 MR. CHORUSH: Objection. 7 A. Well, I wouldn't characterize 8 it as a happy middle based upon my 9 percentages. 10 Q. Why not? 11 A. Well, going with what Judge 12 McKelvie said in his report, he somehow at 13 least gave the impression that there was a 14 95 percent chance of success, because he 15 basically said let's take a look at the 16 time that was left on the patent, and 17 basically Forest retained 95 percent of 18 that time period and the generics retained 19 5 percent of that time period. 20 That doesn't seem to be a happy 21 middle in view of what I handicapped the 22 cases to be. It seems like there had to be 23 something more that the generics were 24 receiving, if they weren't receiving that 25 time.</p>	<p style="text-align: right;">Page 236</p> <p>1 Whether it was or wasn't, I don't know. 2 That was not part of my analysis. 3 Q. Do you have any recollection of 4 what those numbers were? 5 A. I don't, without looking at the 6 document. 7 Q. Do you have a recollection that 8 they were fairly modest sums? 9 A. I have no idea, because I 10 wasn't focused on their numbers. That, to 11 me, was not relevant to my analysis. 12 Q. So let me see if I understand 13 you. 14 You would agree with me that a 15 number of generic companies reached 16 settlements with Forest relatively soon 17 after the claim construction decision, 18 right? 19 A. Well, yes, in that, in the 20 sense of that, it was a time that not only 21 did they reach settlement, but it was a 22 time right -- it was generally after the 23 time of the claim construction. Where I 24 would pause on is I don't know if there is 25 a correlation between the two.</p>
<p style="text-align: right;">Page 235</p> <p>1 Q. And what do you know about 2 whether the generics received something 3 more, what facts do you know? 4 A. I don't know very many facts. 5 Very limited facts. I know there is 6 something more. I have a general 7 understanding around the amounts, but 8 nothing more. 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 Q. And that was compensation for 23 litigation expenses, right? 24 MR. CHORUSH: Objection. 25 A. That's the way it was couched.</p>	<p style="text-align: right;">Page 237</p> <p>1 Q. No, I understand. I'm just 2 trying to get the timing down. 3 A. Fair enough. 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 Q. And is it your understanding 22 that all those generic defendants that 23 settled out sometime around the claim 24 construction decision, is it your 25 understanding that they agreed on an entry</p>

<p style="text-align: right;">Page 310</p> <p>1 Q. Do you think that number, that 2 percentage, is truly valuable for 3 management? 4 A. Absolutely. They utilize that 5 for many reasons, as I identify in my 6 report, some of it is budgetary reasons and 7 other reasons, too. They somehow take that 8 number and attempt to quantify it in terms 9 of the amount of sales that they will 10 obtain after the patent is adjudicated, for 11 example. 12 MR. JOHNSON: No further 13 questions from me at this time. We can go 14 off the record. 15 MR. CHORUSH: Why don't we go 16 off the record for just a couple of 17 minutes. 18 THE VIDEOGRAPHER: We will be 19 going off the record at 4:59 p.m. This 20 marks the end of media 4A. 21 (Recess taken.) 22 THE VIDEOGRAPHER: We are back 23 on the record at 5:02 p.m. This marks the 24 beginning of media 4B. Go ahead, Counsel. 25 MR. CHORUSH: No questions for</p>	<p style="text-align: right;">Page 312</p> <p>1 INDEX 2 3 WITNESS EXAMINATION BY PAGE 3 JOHNSTON JOHNSON 4 4 5 EXHIBITS 6 JOHNSTON DESCRIPTION PAGE 6 Exhibit 1 Expert Report of 7 Johnston 7 Exhibit 2 Reply Expert Report 8 of Johnston 8 Exhibit 3 Joint Pretrial Order 9 Exhibit 4 Deposition transcript of 55 David A. Greenberg 9 Exhibit 5 Expert Report of Paul 66 Spencer Fishman 10 Exhibit 6 Deposition transcript of 70 Paul Spencer Fishman 11 Exhibit 7 Deposition transcript of 91 Jerry Joseph Buccafusco 12 Exhibit 8 Supplemental Expert 262 Report of Malinow 13 Exhibit 9 Deposition transcript of 267 Olney 14 Exhibit 10 Report and 279 Recommendation 15 Regarding Claim Construction 16 Exhibit 11 Memorandum in Forest 284 v. Cobalt 17 Exhibit 12 Expert Report of Doody 285 18 Exhibit 13 Excerpt from The Merck 295 Index 19 20 DIRECTIONS NOT TO ANSWER 21 Page Line (NONE) 22 23 REQUESTS 24 Page Line (NONE) 25</p>
<p style="text-align: right;">Page 311</p> <p>1 me. Thank you for your time today. 2 MR. JOHNSON: Thank you for 3 your time, Mr. Johnston. 4 THE WITNESS: Thank you both. 5 THE VIDEOGRAPHER: We are going 6 off the record at 5:02 p.m., and this 7 concludes today's testimony given by George 8 W. Johnston, Jr. The total number of media 9 units used was eight and will be retained 10 by Veritext. 11 12 [TIME NOTED: 5:02 p.m.] 13 14 GEORGE W. JOHNSTON, JR. 15 16 Subscribed and sworn to before me 17 this ____ day of _____, 2017. 18 19 _____ 20 NOTARY PUBLIC 21 22 23 24 25</p>	<p style="text-align: right;">Page 313</p> <p>1 CERTIFICATION 2 3 I, TODD DeSIMONE, a Notary Public for 4 and within the State of New York, do hereby 5 certify: 6 That the witness whose testimony as 7 herein set forth, was duly sworn by me; and 8 that the within transcript is a true record 9 of the testimony given by said witness. 10 I further certify that I am not related 11 to any of the parties to this action by 12 blood or marriage, and that I am in no way 13 interested in the outcome of this matter. 14 IN WITNESS WHEREOF, I have hereunto set 15 my hand this 27th day of October, 2017. 16 17 18  19 TODD DESIMONE 20 21 22 23 24 25</p>